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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1051

THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK,

Petitioner,

—against—

HENRY H. RAPHIEL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY W. PARKER,
Attorney and Counsel for Petitioner,
56 East 42nd Street,
New York, 17, New York.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, The Morris Plan Industrial Bank of New York, respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for a writ of certiorari to review an order of the United States Circuit Court of Appeals for the Second Circuit, which reversed, on Respondent's appeal, an order denying Respondent's discharge (R. 23).

By its unanimous decision (R. 20-22), the said Circuit Court of Appeals overruled a decision which had been the law in Bankruptcy since 1916. There are no issues of fact, the conceded facts being as follows:

On November 23rd, 1943, Henry H. Raphiel, the Respondent was adjudicated a voluntary bankrupt. Objections to his discharge were filed by Petitioner, alleging that the Respondent had committed offenses punishable by imprisonment under the Bankruptcy Act, in that he had been indicted by the Grand Jury for the Southern District of New York, under indictment filed February 4th, 1929, for the crimes of knowingly and fraudulently (a) concealing from a Trustee in Bankruptcy, merchandise and moneys amounting to approximately $25,000.00, and (b) destroying documents relating to the affairs of a bankrupt, to which indictment the bankrupt had pleaded guilty, and had been sentenced to imprisonment (R. 2, 3).

The facts set forth in the Specifications were stipulated to be true at the hearing on the objections held before Referee Kurtz (R. 5).

On May 8th, 1944, an order was made by Referee Kurtz denying bankrupt's discharge (R. 8).

The Respondent petitioned for a review of the Referee's order denying discharge, contending that since some of the debts which were included in the schedule of debts filed with his voluntary petition in bankruptcy on November 23rd, 1943, were debts which had been included and provable in a prior proceeding in Bankruptcy commenced November 14th, 1928 by the filing of an involuntary Bankruptcy petition against the Respondent and one Samuel Raphiel, individually and as co-partners doing business as Raphiel Bros., out of which Bankruptcy the indictment hereinbefore mentioned arose, and in which proceeding he had not applied for a discharge, he was entitled to a limited order of discharge which would discharge him from all provable debts existing on November 23rd, 1943, except those provable in the prior bankruptcy proceeding commenced November 14th, 1928 (R. 9, 10, 11).

On said review, the order denying discharge was affirmed by Hon. Samuel Mandelbaum, a Judge of the United States District Court for the Southern District of New York. Both Referee Kurtz and Judge Mandelbaum wrote opinions (R. 7, 14, 15) and in both opinions, the opinion of the Circuit Court of Appeals for the Second Circuit, of *In re Lesser*, 234 Fed. 65, was cited.

On appeal to the United States Circuit Court of Appeals for the Second Circuit, the order of Judge Mandelbaum was reversed, and in its opinion, said Circuit Court directed that the Respondent should be granted a discharge from all debts, except those involved in the earlier bankruptcy proceeding. On December 28th, 1944, the order for mandate of said Second Circuit Court of Appeals was entered, review of which is hereby sought (R. 23).

Petitioner's claim against the Respondent arose after the filing of the 1928 petition, and accordingly the result of the action of the Circuit Court, if sustained, will be to discharge Petitioner's claim against the bankrupt.

The provisions of the Bankruptcy Act which apply to the case at bar, are as follows:

> "The court shall grant the discharge, unless satisfied that the Bankrupt has (1) committed an offense punishable by imprisonment as provided under this Act;" * * * Bankruptcy Act, Sec. 14c; 11 U. S. C. A. § 32 (c) (1); Act of June 22, 1938, c. 575; 52 Stat. 850.

and

> "Sec. 29. Offenses.— * * * b. A person shall be punished by imprisonment for a period of not to exceed five years, or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently, (1) concealed from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any proceeding under this Act, any property belonging to the estate of a Bankrupt; or * * * (7) after the

filing of a proceeding under this Act or in contemplation thereof, concealed, destroyed, mutilated, falsified, or made a false entry in any document affecting or relating to the property or affairs of a Bankrupt;" * * * Bankruptcy Act, Sec. 29b; 11 U. S. C. A. § 52b; Act of June 22, 1938, c. 575; 52 Stat 856.

JURISDICTIONAL STATEMENT.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Section 24c of the Bankruptcy Act, and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925. The order for mandate of the United States Circuit Court of Appeals for the Second Circuit in this case was made and entered on December 28th, 1944. By agreement of counsel, no mandate has issued pending decision upon this petition.

QUESTIONS PRESENTED.

On the basis of the foregoing, Petitioner desires this Court to review the following questions:

1. Whether there is any limitation of time with respect to the commission of offenses which would be a bar to a discharge, under Section 14c (1) of the Bankruptcy Act.

2. Whether the offenses which will bar a discharge must have been committed in or in connection with the bankruptcy proceeding in which the discharge is sought.

3. Whether the commission of an act which would bar a discharge in a prior proceeding is a bar, when pleaded and proved, to a discharge in a subsequent proceeding as to debts not involved in the prior proceeding?

REASONS RELIED ON FOR GRANTING THE WRIT.

This Court is requested to grant the writ for the following reasons:

1. The decision of the Circuit Court of Appeals herein is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit on the second question presented. *In re Sieben*, 89 F. 2d 935.

2. This case involves an important question of Federal Law which has not been, but should be settled by this Court. This Court has not had occasion to pass upon the first question presented. It has denied certiorari where the same question was presented, as to a time limitation under Section 14c (3) of the Bankruptcy Act (obtaining credit on a false financial statement) *Arky* v. *Rosenberg*, 138 F. 2d 669, C. C. A. 2 cert. den. 321 U. S. 793. Ever since 1916, the decision of the Second Circuit Court of Appeals in the case of *In re Lesser*, 234 Fed. 65, has been followed as established law to the effect that a discharge will be barred for the commission of a bankruptcy offense, even though the offense was committed in another proceeding. The Seventh Circuit, in the cited case of *In re Sieben*, followed the *Lesser* case, and it was also followed by the District Court of the Eastern District of New York in 1937 in *In re Gophrener*, 20 F. Supp. 922. In the thousands of bankruptcies annually filed throughout the Country, it is important to the bar and to their clients to know how the plain language of Congress will be construed where an offense has been committed by the Bankrupt in another proceeding. In such a case, will a discharge properly be denied?

PRAYER FOR A WRIT.

Wherefore your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your Petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., March 6th, 1945.

HENRY W. PARKER,
Attorney and Counsel for Petitioner,
56 East 42nd Street,
New York, 17, New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No.

THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK,

Petitioner,

—against—

HENRY H. RAPHIEL,

Respondent.

BRIEF IN SUPPORT OF WRIT FOR CERTIORARI.

OPINIONS OF COURTS BELOW.

The opinions of the Referee (R. 7) and of the District Court (R. 14, 15) are not officially reported.

The opinion of the Second Circuit Court of Appeals is reported in 146 F. 2d 340.

JURISDICTION.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Section 24c of the Bankruptcy Act, and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925. The order for mandate of the United States Circuit Court of Appeals for the Second Circuit in this case was made and entered on December 28th, 1944. By agreement of counsel, no mandate has issued pending decision upon this petition.

STATEMENT OF THE CASE.

A sufficient statement of the case will be found in the accompanying petition and in the interest of brevity will not be repeated.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Second Circuit erred as follows:

1. In holding that there was a limitation of time for the commission of a bankruptcy offense which would be a bar to a discharge.

2. In holding that a bankruptcy offense which would be a bar to a discharge must be committed in or in connection with the proceeding in which the discharge is sought.

3. In holding that where a Bankrupt has committed an offense which would bar a discharge in a prior proceeding, in which no discharge was applied for, the commission of such offense may not be pleaded as a bar to a discharge in a subsequent proceeding of debts incurred since the prior proceeding.

ARGUMENT.

POINT I.

The Circuit Court of Appeals for the Second Circuit has rendered decision in the case at bar in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *In re Sieben*, 89 F. 2d 935, and in conflict with its prior decision of *In re Lesser*, 234 Fed. 65.

The first reported decision on the question involved in the second specification of error is that of the District Court for the District of South Carolina, in 1902, reported in *In*

re Blalock, 118 Fed. 679. wherein Judge Brawley held that where a bankrupt has testified falsely in another bankruptcy proceeding, such false oath may not be used as a bar to a discharge in his subsequent proceeding. In February of 1916, Judge Learned Hand, then a District Court Judge, following the *Blalock* case said, *In re Lesser*, 232 Fed. 368:

> "I sustain the exceptions to the third specification, on the ground that no perjury in a bankruptcy proceeding other than that of the bankrupt himself is ground for opposition to the discharge. In re Blalock (D. C.) 118 Fed. 679. * * * I admit that a mere literal reading of the two sections (14 & 29) might lead to a contrary result; but it is perfectly obvious that the bankrupt's discharge depends upon his conduct towards his own creditors, and not upon his general truthfulness, even in other independent proceedings."

On appeal from the District Court decision of Judge Learned Hand, the Circuit Court of Appeals for the Second Circuit per Coxe, Circuit Judge, held as follows:

> "The only question involved in this review is whether the false oath which bars the bankrupt's discharge must be made in the pending bankruptcy proceeding. The bankrupt contends for the affirmative and the petitioner for the negative of this proposition. The District Judge followed the decision in the Blalock Case (D. C.) 118 Fed. 679, in which it was held that the making of a false oath by a bankrupt in a proceeding in bankruptcy not against himself, but against a corporation of which he was an officer, was not a sufficient ground for refusing his discharge. The judge says in his opinion:
> "'I am satisfied that although it is a crime to make any false oath in any proceeding in bankruptcy, it is not a ground for refusing a discharge unless the oath be made in the bankruptcy proceedings of the bankrupt himself.'

"We are unable to agree with this ruling, principally for the reason that the statute contains no such limitation. Section 14b provides that:

"'The Judge * * * shall discharge the applicant unless he has committed an offense punishable by imprisonment as herein provided.'

"'As herein provided', means as provided under the head of 'Offenses' in Bankruptcy Act, § 29a. If a bankrupt applying for a discharge has committed an offense covered by Section 29a, his discharge must be refused. It would be an absolute impossibility for him to commit some of these offenses in his own bankruptcy. One of the offenses punished by Section 29a is the embezzlement by a Trustee in bankruptcy of property belonging to the estate of the bankrupt. If the trustee is convicted of such embezzlement and subsequently becomes a bankrupt himself, he can, if the ruling of the District Judge is correct, obtain his discharge, notwithstanding his conviction under section 29a of an offense which section 14 declares is a absolute bar to a discharge. There is nothing in the act which confines the perjury which bars a discharge to that committed in the bankrupt's own proceeding. On the contrary, many of the offenses conviction of which bars a discharge cannot, as before stated, be committed in the bankruptcy proceedings of the applicant for a discharge. We cannot think that the lawmakers intended a result so illogical as to permit a trustee, who has embezzled the estate of the bankrupt placed in his care by the court, to file a petition of his own and procure a discharge, notwithstanding his crime, because it was committed in a bankruptcy proceeding other than his own. There is nothing compelling such a construction; on the contrary a harmonious and logical interpretation of the law forbids it. The construction urged by the bankrupt would eliminate entirely many of the offenses which the law says shall bar a discharge. He might be con-

victed in another bankruptcy proceeding of perjury, or presenting a false proof of claim, of receiving money from a bankrupt after petition filed against him, of extorting money from a person for acting or forbearing to act in bankruptcy proceedings; and yet he would receive his discharge if these crimes were committed in other bankruptcy proceedings and many of them could be committed only in other proceedings. It seems to us that the construction conteded for by the bankrupt will defeat the intention of the lawmakers and involve the interpretation of the sections in question in extricable confusion. We think that the intention of the lawmakers was to refuse a discharge to a bankrupt who has taken a false oath in any bankrupt proceeding. If he can commit perjury once and succeed he will be quite likely to attempt it again. The contention that the perjury must be committed in his own bankruptcy is contrary to the letter of the law and if sustained may lead to deplorable results.

"The order is reversed and the District Court is instructed to permit an amendment to the third specification." *In re Lesser,* 234 Fed. 65 C. C. A. 2, June 6, 1916.

The decision by the Circuit Court in the *Lesser* case has been the law ever since 1916 up to the time of the decision in the instant case. Its reasoning has been followed by the text writers. "It is not necessary for the bankruptcy offense to have been committed in the identical proceeding; it may have been committed in some other bankruptcy proceeding." *Collier on Bankruptcy,* 14 Ed. Vol. I, Page 1295, Par. 14.17. "* * * and this is so even though it has been made in a bankruptcy proceeding, not his own." 8 C. J. S. Page 1409.

In 1937, the Circuit Court of Appeals for the Seventh Circuit, in deciding whether perjury by a husband in a wife's prior proceeding is a bar to relief under Section 74 in a proceeding by the husband, stated:

> "We find no case in point as to what is to be considered by the court in determining whether or not a petition is filed in good faith. We may, however, call attention to the fact that under section 29b (2) of the Bankruptcy Act, as amended, 11 U. S. C. A. § 52 (b) (2), perjury in relation to any proceeding in bankruptcy subjects the perjurer to criminal prosecution and bars his discharge in any subsequent proceeding of his own by virtue of section 14b (1), 11 U. S. C. A. § 32 (b) (1). See In re Lesser (C. C. A.) 234 F. 65. Hence, by analogy, we think the court is justified in considering the perjury here admitted, as a bar to the right of the husband to relief under section 74. There was no error in holding that the dismissal of the wife's prior petition was res adjudicata of her present rights on the question of good faith. Decree affirmed."
>
> *In re Sieben*, 89 F. 2d 935.

In the same year, 1937, Judge Byers, in the Eastern District of New York, ruled:

> "The fact that the concealment occurred in another bankruptcy proceeding, does not aid the bankrupt."
>
> *In re Gophrener*, 20 F. Supp. 922, 34 A. B. R. (N.S.) 485.

Significantly, Judge Frank in his opinion in the case at bar did not cite any authority for his statement that "Where a discharge is barred under § 14c (2)-(7) because of a wrongful act of the debtor, a future discharge will be denied only in regard to those who were creditors at the time that the wrongful act occurred, or became creditors within the time specified by the Act."

No reported decision has been found by counsel where the facts alleged in opposition to a discharge in a prior proceeding, were likewise alleged in opposition to a discharge in a subsequent proceeding. While the criminality of the bankrupt in the case at bar might have been alleged in opposition

to his discharge in the 1928 proceeding, the bankrupt chose not to tender such issue to his then creditors by failing to file a petition for discharge as then required. His conviction of the charges, however, makes his commission of such offenses *res judicata*.

Hence this case presents an unusual case of first impression on the third error specified.

POINT II.

The Circuit Court of Appeals decided an important ques- of Federal Law, which has not been, but which should be settled by this Court. None of the matters involved in the three errors specified hereinabove, nor in the questions presented in the accompanying petition appears to have been decided by this Court. In *Arky* v. *Rosenberg*, 138 F. 2d 669, C. C. A. 2, cert. den. 321 U. S. 793, the first question presented in the petition for writ of certiorari was "whether a discharge may be denied to a bankrupt upon and based on matters unconnected in any way with the proceedings before the court." In that case the discharge had been denied by the Referee, the District Judge, and the Circuit Court of Appeals for the Second Circuit on the ground that three years prior to bankruptcy, bankrupt had obtained credit by making a false financial statement, which credit so obtained had been repaid thirteen months prior to bankruptcy.

In the case at bar, the Circuit Court of Appeals has, in overruling its own logical and well considered decision in *In re Lesser*, 234 Fed. 65, so far departed from the expected and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

By its decision in this case, the Circuit Court has by judicial legislation attempted to put into the Bankruptcy Act as enacted by Congress a new clause, reading somewhat as follows: "14c, the court shall grant a discharge unless satisfied that the bankrupt has (1) committed *in or in connection with the proceeding in which the discharge is sought*, an

offense punishable by imprisonment as provided under this Act." (Italicized matter added by implication by the Circuit Court.)

Here the Circuit Court of Appeals for the Second Circuit has on two occasions when it was asked to determine the intention of Congress with respect to the meaning of Section 14c (1) of the Act, reached diametrically opposite results. The *Lesser* case clearly holds that the offense need not be committed in the proceeding in which the discharge is sought. In the case at bar, the same Court, although not the same judges, held that the offense must be committed in or in connection with such proceeding.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari in this case should be granted.

Dated: New York, N. Y., March 6th, 1945.

HENRY W. PARKER,
Attorney and Counsel for Petitioner,
56 East 42nd Street,
New York, 17, New York.

No. 1051 (31)

IN THE

Supreme Court of the United States

THE MORRIS PLAN INDUSTRIAL BANK
OF NEW YORK,

Petitioner,

—against—

HENRY H. RAPHIEL,

Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

JOHN L. GRANT,
Attorney for the Respondent.

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HENRY H. RAPHIEL,

Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Application is made by Petitioner for a writ of certiorari to review an order of the United States Circuit Court of Appeals for the Second Circuit, which reversed, on Respondent's appeal, an order denying Respondent's discharge in bankruptcy.

Statement of the Case

On November 14, 1928, an involuntary petition in bankruptcy was filed against Respondent and one Samuel Raphiel; thereafter Respondent was duly adjudicated Bankrupt (R. 2), but no application for discharge from his then existing indebtedness was made by Respondent (R. 10).

On February 4, 1929 an indictment was filed in the United States District Court, Southern District of New York, against Respondent for unlawfully, wilfully, knowingly, and fraudulently concealing from his then Trustee in Bankruptcy, merchandise and moneys amounting to approximately $25,000, and for destroying documents relating to his affairs

as said Bankrupt (R. 2), to which indictment he pleaded guilty and was sentenced to six months' imprisonment (R. 3).

Thereafter and on November 23, 1943, a voluntary petition in bankruptcy was filed by Respondent, and on said day an order of adjudication was entered (R. 9).

Set forth in the schedules filed by the Respondent on November 23, 1943, were debts owing by him to creditors whose debts were incurred at the time of the prior bankruptcy (R. 9), as well as a number of new indebtednesses that the Respondent had incurred not less than five years after the previous petition was filed against him (R. 10).

Thereafter an order was made in the present proceeding, fixing February 9, 1944 as the last day for the filing of objections to the Respondent's discharge (R. 9); and on April 13, 1944 a hearing upon the objections filed by the Morris Plan Industrial Bank of New York, whose debt was incurred by Respondent in 1933, came on for hearing before the Referee (R. 4, 5, 6), on which hearing it was conceded by the Respondent that the matters set forth in the specifications of objection to his discharge were in all respects true (R. 5). A motion was then made for a discharge of the Respondent from all his indebtednesses except those that were involved in the prior bankruptcy proceeding (R. 5).

Thereafter the Referee denied a discharge to the Bankrupt not only from the debts involved in the first bankruptcy proceeding, but also from the new indebtednesses that he had incurred from 1933 down to the filing of the second petition in 1943 (R. 7, 8).

Thereafter this matter came on to be heard before the District Court, upon a petition to review, and the order of the Referee was affirmed (R. 14, 15, 16).

On appeal to the United States Circuit Court of Appeals for the Second Circuit, the order of the District Court was reversed, and said Circuit Court directed that the Respondent be discharged from all debts, except those involved in the prior bankruptcy proceeding (R. 20, 21, 22, 23).

Argument

Point I.

The Petitioner seeks to review the decision of the Circuit Court, reversing the determination of the District Court, on the ground that such decision holds, in effect, that to preclude a discharge the Bankrupt must commit the bankruptcy offense in his own bankruptcy proceeding and not in some other proceeding, and also in effect it holds that the denial of a discharge because of an offense committed by the Bankrupt in his own bankruptcy, in violation of the Bankruptcy Act, does not preclude a discharge in any subsequent proceeding, but only from a discharge from the debts in existence at the time the offense was committed.

Neither in the case of *In re Lesser*, 234 Fed. 65, nor in any of the other cases cited by Petitioner, was it held that an offense committed by the Bankrupt in a proceeding not his own, precluded the Bankrupt for all time from a discharge in any subsequent bankruptcy proceedings. This decision was in effect followed by all the other cases cited by Petitioner, and they simply hold that it is not necessary for the bankruptcy offense to have been committed in the Bankrupt's own bankruptcy proceeding in order to preclude him from a discharge from his then debts, and the decision of the Circuit Court has now reversed itself on that proposition and holds that the bankruptcy offense must be committed in the Bankrupt's own proceeding. However, this is beside the question, so far as this proceeding is concerned, since the offense committed by the Respondent in 1928, in violation of the provisions of the Bankruptcy Act, precluded him from obtaining a discharge in the prior proceeding, and such offense was committed in his own proceeding, and it was contended by Respondent in the Court below that while such offense precluded his discharge in the prior proceeding, it did not preclude his discharge in a subsequent proceeding, nor preclude him from a discharge for all time.

The Circuit Court, in its opinion (R. 22), distinctly held that the doctrine adopted by the District Court did prevent the discharge in bankruptcy as to all creditors for all time, and that nothing in the Act so provides, and there is nothing in the legislative history to justify it. The Act itself provides that a petition may be filed after the expiration of six years from a prior discharge, and surely if the bankrupt committed a bankruptcy offense, it would only preclude him from a discharge from his then creditors, and if Congress intended otherwise, namely that it should preclude him from a discharge in bankruptcy for all time, it would clearly have so stated in the Act.

As heretofore stated, none of the cases cited by Petitioner is authority in support of this proposition, as there is no holding that because of the commission of a bankruptcy offense by a bankrupt, either in his own or in some other bankruptcy proceeding, it will preclude a discharge in a subsequent proceeding from debts incurred many years after the first proceeding. The Circuit Court, in this respect, so held, and this holding is not in conflict with any other decision in any other Circuit. In addition, the holding by the Circuit Court that the bankruptcy offense must be committed in the Bankrupt's own proceeding was held, in the case of *In re Blalock,* 118 Fed. 679, and now the Second Circuit, in the proceeding at bar, has finally determined to follow that decision, and therefore the decision now made by the Circuit Court, in overruling its previous decision in *In re Lesser, supra,* is not in conflict with the decision of any other circuit, as the other cases cited by Petitioner simply followed this decision.

In the proceeding at bar, the Respondent contends that the commission of a bankruptcy offense in 1928, which was an offense committed in his own bankruptcy proceeding, would preclude him from a discharge from the debts of his then creditors, but would not preclude him for all time from a discharge in any subsequent proceedings, and none of the cases cited by Petitioner, hold to the contrary, and under these circumstances certiorari should be refused.

Point II.

The Respondent herein was entitled in the bankruptcy proceeding filed in November, 1943, to a qualified discharge, namely a discharge from all his provable debts scheduled in that proceeding and which were not included in and not in existence at the time of the bankruptcy proceeding in 1928.

As aforesaid, it was conceded by Respondent that he had unlawfully, wilfully, knowingly, and fraudulently concealed from his Trustee in Bankruptcy merchandise and money amounting to approximately $25,000, and destroyed documents relating to his affairs in that proceeding, and that an indictment was filed in the District Court on February 4, 1929, charging him with the offenses aforementioned, and that he pleaded guilty thereto and was sentenced to six months in prison therefor.

The Petitioner, The Morris Plan Industrial Bank of New York, was not a creditor of the Bankrupt at the time of the prior bankruptcy proceeding, the indebtedness owing to this creditor having been incurred by the Bankrupt, as shown by the schedules in bankruptcy, in or about the year 1933, approximately five years after the former bankruptcy proceeding was commenced. The voluntary petition in bankruptcy in this proceeding was filed on November 23, 1943, approximately fifteen years after the first proceeding, and all the new debts scheduled in the present proceeding were incurred between the years 1933 and 1943, many years after the prior bankruptcy proceeding, and many years after the matters alleged in the indictment occurred.

The contention made by Petitioner that the Respondent, in connection with the former proceeding, concealed assets and destroyed documents relating to his then affairs, constitute grounds to perpetually deny a discharge to him in any bankruptcy proceeding subsequent to the 1928 proceeding, and involving debts incurred thereafter and not in-

cluded in the former proceeding, is definitely untenable.

The District Court, in affirming the Referee's order denying a discharge, erroneously held that since the Respondent had committed an offense under the Bankruptcy Act, Section 14, subdivision (c) (1), which is punishable by imprisonment, that this fact differentiates it from the adjudicated cases and thereby prevents the Respondent forever from obtaining a discharge not only from debts incurred at the time the imprisonment occurred but also from any debts thereafter incurred.

The Bankruptcy Act specifically provides, Section 14, subdivision (c) (5), that after a six-year period, a person may again avail himself of the beneficent provisions of the Bankruptcy Act.

In the case of *Chopnick* v. *Tokatyan*, 128 F. (2d) 521, it was held:

> "Even without that provision (subd. a, Sect. 11) we believe that the principle of res judicata should lead to the same conclusion. Denial of a discharge from provable debts, or failure to apply for it within the statutory period, bars an application in a subsequent bankruptcy proceeding for discharge from the same debts. Freshman x. Atkins, 269 U.S. 121, 70 L. ed. 193, 46 S. Ct. 41, 6 A.B.R. (N.S.) 744; In re Schwartz, 2 Cir., 89 F. (2d) 172, 33 A.B.R. (N.S.) 674; In re Summer, 2 Cir. 107 F. (2d) 396, 41 A.B.R. (N.S.) 246; Perlman v. 322 West Seventy-second Street Co., 2 Cir. April 11, 1942, 127 F. (2d) 716, 49 A.B.R. (N.S.) 212. We think this equally true whether denial of the discharge was because of a previous discharge within six years, as in the case at bar, or on some other ground specified in Sect. 14. In re McCausland, D.C.S.D. Cal. 9 F. Supp. 129, 26 A.B.R. (N.S.) 735, appeal dismissed in McCausland v. International Shoe Co., 9 Cir. 79 F. (2d) 1001."

This decision definitely holds that even though the discharge in the first proceeding was upon any ground specified in Section 14, such a denial prevents a discharge from the same debts in a subsequent bankruptcy proceeding.

The Respondent concedes, of course, that he is not entitled to a discharge from the provable debts in the 1928 proceeding, since he failed to apply for a discharge within the statutory period, and he is therefore barred in this proceeding from a discharge from these same debts, and it was so held in the above quoted case. All the Respondent sought to obtain in this proceeding was a discharge from the new debts incurred in and between the years 1933 and 1943, with the debts existing at the time of the prior bankruptcy proceeding excepted. Such a qualified discharge may be granted in a second bankruptcy.

See:

In re Early, 34 F. Supp. 774, 43 A.B.R. (N.S.) 518.

Under the law prior to 1938, there was a definite time limit within which a bankrupt had to make application for a discharge. While an extension was permitted, if the time finally elapsed without application, a discharge could not be obtained. The Act of 1938 now makes a petition constitute an automatic application for a discharge. It frequently happens that petitions are dismissed because of the failure of the bankrupt to deposit the necessary funds to enable the Referee to send out notices. Such dismissal, in effect, is a denial of a discharge on the debts which were listed in the proceeding, and the effect of dismissal is the same as failure to apply for a discharge within the statutory period. After such a dismissal the Bankrupt cannot obtain a discharge of debts listed in the petition in a subsequent proceeding.

In re Sheff, 44 F. Supp. 795, 51 A.B.R. (N.S.) 42. This case is also authority for the proposition that a bankrupt may be entitled to a discharge from new debts, but not to a discharge from old debts which were listed in a prior proceeding in which a discharge was not granted, and if a discharge is granted in respect of the new debts, it should specify with particularity, the items from which the debtor is not to be discharged.

See also:

Hisey v. *Lewis-Gale Hospital*, 27 F. Supp. 20, 40 A. B. R. (N. S.) 206;
In re Bacon, 193 F. 34;
Pollet v. *Cosel*, 179 F. 488.

This entire subject was fully discussed in the case of *In re Zeiler*, 18 Fed. Supp. 538.

In the case of *Blumenthal* v. *Jones*, 208 U. S. 64, it was held as follows:

> "Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all times and in all courts, between those parties or privies to it, the facts upon which the refusal is based."

The courts have never held that the acts committed by a bankrupt in the first proceeding can be availed of by any creditors concerning debts subsequently incurred by the bankrupt when application for discharge is made in a subsequent proceeding. From the above citations of authority it is perfectly apparent that only the creditors who were concerned with the prior proceeding can avail themselves of the claim of *res judicata*, so far as a discharge from their debts in the second proceeding is concerned, but certainly

the new creditors scheduled in the subsequent proceeding, cannot avail themselves of any act of the bankrupt that would have prevented a discharge from his provable debts in the prior proceeding.

As was said in the case of

> *Prudential Loan & Finance Co. v. Robarts*, 52 F. (2d) 918:
>
> "The refusal of a discharge because of a prior discharge within six years stands on a different footing from a refusal on any other ground. The other grounds all involve reprehensible conduct of the bankrupt, which Congress intended to punish by perpetual refusal to discharge him from the claims of his then creditors."

This case is direct authority for the proposition that no matter what reprehensible conduct this Respondent was guilty of in the prior proceeding, it does not prevent a discharge from his new debts in this proceeding, but does perpetually prevent a discharge from the debts included in the prior proceeding, that is from the claims of his then creditors. It appears that the acts committed by the Respondent in the former proceeding, no matter how reprehensible, cannot be used as a bar to his discharge, in the present proceeding, except upon a plea of *res judicata;* that is, the old creditors have the right to come in and say that they were parties to the former proceeding, and therefore all matters determined in the former proceeding are *res judicata* in the subsequent proceeding, so far as their debts are concerned. But the new creditors cannot come in and claim that the acts committed by the Respondent in the former proceeding, in violation of the provisions of Section 14, are now available to them as a perpetual bar to his discharge from his new debts, and no case so holds.

It does not make a particle of difference what acts the Respondent committed in violation of Section 14 (c) of the Bankruptcy Act, or whether the Respondent suffered imprisonment. He is entitled to his discharge in this proceeding from the new debts involved in this proceeding. Any of such acts do not prevent a perpetual discharge, except so far as the debts included in the prior proceeding are concerned, and all the authorities so hold, namely that the denial of a discharge affects the then existing debts, but does not prevent a discharge from those subsequently incurred by the bankrupt and which are included in a new bankruptcy proceeding.

The cases cited by the Referee in his opinion (R. 7), and by the District Court (R. 14, 15), are definitely not in point, and are in no way decisive of the question here involved.

The case *In re Lesser, supra*, held that it was the intention of the law makers to refuse a discharge to a bankrupt who has taken a false oath in any bankruptcy proceeding, and that the contention that the perjury must be committed in his own bankruptcy proceeding is contrary to the letter of the law. The bankrupt had made false oaths in a proceeding in bankruptcy other than his own, and it was held that even though the false oath had been made in a different bankruptcy proceeding from the one at bar, this was sufficient to refuse a discharge to the bankrupt and that is all that case held. It did not hold that thereafter the bankrupt would be forever precluded from a discharge in any subsequent proceeding in bankruptcy, concerning new debts incurred and not included in the prior proceeding. That question was not before the Court in that case, and was certainly not authority for the denial of a discharge to this Respondent, so far as the new debts included in this subsequent proceeding were concerned.

The second case cited is in *Re Sieben*, 89 Fed. (2d) 935. This, likewise, is not an authority in support of the objecting creditor's contention. This case simply follows the

reasoning of the *Lesser* case aforementioned, and holds that perjury in relation to any proceeding in bankruptcy subjects the perjurer to criminal prosecution, and bars his discharge in any subsequent proceeding of his own. This determination unquestionably, under the decisions, would be *res judicata*, as between the then existing creditors and the Respondent, but certainly does not hold that the denial of a discharge in this proceeding would prevent a discharge of the Respondent in a subsequent proceeding, years later, concerning new indebtednesses incurred by the Respondent long after the prior proceeding.

The third case cited is that of *Re Gophrener*, 20 Fed. Supp. 922. This likewise followed the reasoning in the *Lesser* case. The bankrupt and others had conspired to conceal from the Trustee in Bankruptcy in another case, and the Bankrupt was convicted and sentenced. The District Court held that the bankrupt was not entitled to a discharge, which is a matter of favor. The fact that the concealment occurred in another bankruptcy proceeding did not aid the bankrupt.

The Court distinctly held that a concealment in another bankruptcy case was a violation of the Bankruptcy Act, Section 14 (c), but again the observation is made that the Court in no wise held that this would perpetually prevent a discharge to the bankrupt in any subsequent proceeding, involving new debts incurred a reasonable time thereafter.

See:

Re Kuffler, 93 C. C. A. 671, 168 Fed. 1021 (2d Circuit).

Conclusion

It is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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